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Court of Appeals No. 57850-2-I

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL S. JONES R.Ph.,

Petitioner,

v.

STATE OF WASHINGTON AND ITS DEPARTMENT OF HEALTH, WASHINGTON STATE BOARD OF PHARMACY; PHYLLIS WENE; and STAN JEPPESEN, individually and as investigators for the Washington State Board of Pharmacy, and DONALD WILLIAMS, individually and as executive director of the Board of Pharmacy,

Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Michael Jones was the Respondent in the Court of Appeals and the Plaintiff in the trial court.

II. CITATION TO COURT OF APPEALS DECISION

Jones seeks review of the opinion filed by Division One of the Court of Appeals of the State of Washington on June 4, 2007, in *Jones v. State of Washington, et al,* COA #57850-2-I. The opinion was ordered published on September 17, 2007. (Citations to the Court's opinion correspond to the Unpublished Opinion, a copy of which is attached hereto as Appendix 1.)

III. ISSUES PRESENTED FOR REVIEW

1. Is the post-deprivation remedy of a disciplinary proceeding sufficient to satisfy any procedural due process concerns arising out of the summary suspensions – without notice or opportunity to be heard – of a pharmacist's professional and pharmacy licenses?

2. What constitutes a material fact question about a government official's reasonable belief in the existence of a public emergency for purposes of deciding a motion for summary judgment based on a governmental official's qualified immunity defense to a 42 U.S.C. §1983 procedural due process claim arising out of the *ex parte* suspension of a pharmacist's license?

3. If the administrative proceedings relating to the suspensions of a professional license can no longer provide the licensee with an adequate remedy for his economic losses, must he nevertheless pursue the administrative action to the bitter end in order to preserve his state-law claims based on those losses?

IV. STATEMENT OF THE CASE

Jones has practiced pharmacy continuously in the state of Washington since 1980. In Jones's experience, pharmacy inspectors perform inspections approximately once every two to three years. Such inspections typically take one hour to complete and cause minimum disruption to the operation of the pharmacy. CP 213.

On December 17, 1998, pharmacy inspector Phyllis Wene conducted another inspection of Jones's pharmacy. The pharmacy received a failing score of 79. On February 3, 1999, Phyllis Wene re-inspected Jones's pharmacy; the pharmacy received a passing score of 96. CP 212-13.

On July 12, 1999 – only five months after his last inspection - inspectors Wene and Stan Jeppesen arrived unannounced at Jones's pharmacy and conducted another inspection. This inspection resulted in a failing score of 48. Jones presented the following evidence about this July 12 inspection and report:

1. Wene and Jeppesen misrepresented the purpose of their presence; they told Jones that they were there to train Jeppesen – not to inspect Jones's pharmacy;

2. The inspection lasted seven hours – not one hour.

3. During the inspection, Jones was subjected to numerous acts of harassment including: Jeppesen crowding Jones and interrupting him while he tried to fill prescriptions; Jeppesen standing directly

behind Jones – often within six inches – and interrupting him while he entered information on the computer system; Jeppesen intimidating him while he filled prescriptions or spoke with customers; Wene and Jeppesen standing on either side of Jones and making repeated demands in rapid-fire succession that he access computer records or answer their independent inquiries; Wene making exaggerated displays of photocopying documents in an attempt to intimidate him; Jeppesen yelling at Jones and banging his hands on the pharmacy counter while Jones tried to select, count, and prepare medications.

4. Wene and Jeppesen's conduct shocked and intimidated Jones, his employees and his customers.

5. The inspection report contained numerous errors. Contrary to the inspection report:
   - Jones had entered allergy and chronic disease information about customers into his computer, but unbeknownst to Jones, his QS-1 computer system was recording the information but not processing it;
   - Jones did have written records of patients' requests for non-child resistant caps;
   - Jones had a regular process for checking outdated medications;
   - Jones did not have 38 outdated items on the shelves;
   - Jones did have the required DEA order forms and invoices;

6. On July 12, 1999 – the date of the inspection – Jones's pharmacy was in better shape than it had been on February 3, 1999, when Jones's pharmacy had received a passing score of 96.

CP 213-14. Because this appeal arises out of Respondents' motion for summary judgment, these facts must be taken as true.

On August 10, 1999, Jeppesen and Wene returned to Jones's pharmacy and conducted a re-inspection. This time Jones's pharmacy received a failing grade of 56. Jones presented the following evidence about the August 10, 1999, re-inspection report:

1. The re-inspection report contained numerous errors:
   - After the first inspection, Jones contacted officials with the QS-1 computer system, and they turned on the part of the program which processed medical conditions;
   - Jones did have records for authorization to use non-child resistant caps;
   - Jones did not substitute a drug that had been prescribed by a doctor;
   - Jones did not have outdated medications on his shelf;
   - Jones had matched DEA order forms with invoices;
   - Jones did perform the inventory for Schedule II and Schedule III drugs prior to the re-inspection;
   - Jones's prescriptions were in sequential order by prescription number. If there were any missing prescriptions, Jones believes that was the result of theft by a former employee, Mary Berlin, whom Jones had fired for misconduct, and who, unbeknownst to Jones, was an anonymous informant for the state.

2. In addition to the numerous errors in each inspection report, the scoring of the deficiencies was conducted in an arbitrary and capricious manner. In numerous instances, the inspector deducted five points (the maximum per deficiency) for minor discrepancies.

3. The condition of Jones's pharmacy had improved since February 3, 1999, and only erroneous and capricious scoring could account for the difference in Jones's score of 96 on February 3, 1999, and his failing score of 56 on August 10, 1999;

4. Since receiving his professional license, Jones has worked at numerous pharmacies and encountered numerous inspections by inspectors with the Board of Pharmacy. In July and August of 1999, Jones's pharmacy was in greater compliance with the pharmacy rules and regulations than many of those other pharmacies which have previously received passing scores.

CP 214-15. Because this appeal arises out of Respondents' motion for summary judgment, these facts must be taken as true.

On August 10, 1999, after failing the re-inspection, Wene gave Jones a Respondent Written Notice and a Respondent Statement Instructions along with written interrogatories. No one told Jones that there might be a hearing to determine whether his license should be revoked summarily. No one told Jones that the condition of his pharmacy constituted an emergency. CP 216-17. *See Response Brief of Respondent Michael S. Jones R.Ph., Appendix A ("Appendix A"), Exhs. 3 and 4.*

On August 16, 1999 – more than **five weeks** after the initial failed inspection – Donald Williams, the executive director of the Board of Pharmacy, and David Hankins, an assistant attorney general, filed a five-page Ex Parte Motion for Summary Action requesting the immediate suspension of Jones's professional and pharmacy licenses and the closing of his pharmacy. CP 291-95. Neither Williams nor any official with the Board of Pharmacy notified Jones or his attorney of the motion, of the requested order, or of the hearing on the motion. CP 216-17.

On August 17, 1999, the Board of Pharmacy conducted an *ex parte* hearing, granted the motion, and issued an *ex parte* order summarily suspending Jones's professional and pharmacy licenses. Again, no one notified Jones or his attorney of the hearing. Indeed, Jones's attorney, Bernie Bauman, had been led to believe that no motion was pending. CP

216; CP 145. Had anyone notified either Jones or his attorney, Jones and his attorney could have appeared at the hearing. CP 216-17; CP 145.

The summary suspension caused Jones to lose his pharmacy franchise, his source of pharmaceuticals, and ultimately, his commercial lease and business. The franchise was terminated effective August 31, 1999, because of the summary suspensions of Jones's licenses. CP 217-20.

Jones sought immediate relief from this administrative action, and the state repeatedly opposed Jones's requests for an immediate hearing:

- On August 27, 1999, Jones filed a motion to modify the Ex Parte Order of Summary Action and to stay the summary suspensions pending a hearing on the merits of the allegations contained in the Statement of Charges. *Appendix A, Exhs. 7, 8 and 9.* On September 1, 1999, the Department of Health, Board of Pharmacy filed its opposition to Jones's motion for a stay of the summary suspensions. The Department of Health argued, in part, that Jones's motion to modify should be denied because it was moot. The Department's mootness argument was based on the fact that Jones's franchise had been terminated. *Appendix A, Exh. 10.* On September 7, 1999, the Board of Pharmacy denied Jones's motion to modify the summary suspensions of his licenses. *Appendix A, Exh. 11.*

- On September 13, 1999, Jones requested a Petition for Expedited Hearing on the merits of the charges contained in the Statement of Charges. The petition made clear that unless Jones was given an immediate opportunity to have the summary suspensions overturned at a hearing on the merits, he would suffer almost certain financial ruin. *Appendix A, Exh. 12.* On September, 21, the Board of Pharmacy opposed Jones's petition for an expedited hearing and proposed instead that the matter be heard on the

Board's next regularly scheduled hearing date. *Appendix A, Exh. 13.*

- On September 22, 1999, Jones, through counsel, contacted the Board of Pharmacy and requested an immediate settlement conference on an emergency basis. The reason for this request was that unless Jones could have his professional and pharmacy licenses reinstated immediately through a settlement conference, he faced almost certain financial ruin. *Appendix A, Exh. 14.* The state refused to hold a settlement conference. CP 217.

- On September 29, 1999, the Board of Pharmacy ostensibly granted Jones's motion for an expedited hearing. However, it refused to set a special hearing and instead scheduled the expedited hearing for the Board's next regularly scheduled hearing date, October 21, 1999. *Appendix A, Exh. 15.*

- On October 18, 1999 – three days before the scheduled hearing – the Board of Pharmacy moved for a continuance of the October 21, 1999, hearing. The Department argued that a continuance was necessary because it intended to file an amendment to the Statement of Charges in order to add additional charges against Jones. Jones opposed the continuance and asked that the hearing go forward as scheduled. The Administrative Law Judge granted the Board's motion and reset the *expedited* hearing for the Board of Pharmacy's next regularly scheduled meeting on December 2, 1999. *Appendix A, Exh. 16.*

- By November 1999, Jones had lost everything. Because of the summary suspensions, the Medicine Shoppe International had terminated his franchise effective immediately on August 31, 1999. CP 217-20. But for the summary suspensions, Jones could have saved his franchise. Because of the summary suspensions, he lost his franchise, lost his commercial lease, and lost his business. CP 217.

- On January 11, 2000, Jones signed the Stipulated Findings of Fact, Conclusions of Law and Agreed Order. Pursuant to the Agreed Order, Jones's pharmacy license was revoked, and Jones's professional license was Suspended with Stay for five years from the date of February 17, 2000. Jones signed the stipulated order

because he had already lost his business and he no longer had the financial wherewithal to fight the Board of Pharmacy's charges.

Although Jones signed the stipulated order, he did not admit to any wrongdoing. At the very outset of the Stipulated Facts at page 3 of the order, it states: "While Respondent does not admit to the following conduct, Respondent acknowledges that the evidence is sufficient to justify the following findings". *Appendix A, Exh. 17.* Jones never intended to waive his right to sue the Board of Pharmacy for what it had done to him. Jones always intended to pursue a lawsuit against the Board of Pharmacy once he could marshal the financial resources for a lawsuit. Jones's understanding was that the stipulated order would have no impact on his right to sue the Board of Pharmacy. He would not have agreed to the stipulated order if he had understood that it waived his right to sue. CP 218.

V. ARGUMENT

A. The Petition presents two significant questions of federal constitutional law – both of which the Court of Appeals got wrong. RAP 13.4(b)(3)

1. The Court's opinion wrongly suggests that there can be no procedural due process violation when the state affords post-deprivation process.

The Court ruled that the individual defendants were entitled to qualified immunity because Jones failed to establish a "genuine issue of

material fact about whether they engaged in conduct violating a plaintiff's clearly established constitutional rights." *Unpublished Opinion, p* 12-13.[1] In particular, the Court opined that Jones "received all the process that was due" because he "received notice of the summary suspension and of all later charges and hearings associated with his professional licenses." *Id.* at 15.[2]

The Court's focus on the process that took place after the summary suspensions of Jones's licenses misses the point; the constitutional violation was complete when Jones was summarily suspended without notice and an opportunity to be heard. In most instances, the constitutional right to procedural due process requires notice and an opportunity to be heard prior to (not after) the property deprivation. By

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> Once the defendant asserts qualified immunity, the plaintiff must establish that the defendant violated a clearly established constitutional right in order to survive summary judgment. Jones claims the individual defendants violated his due process rights when they suspended his licenses. But the suspension was authorized by law, and we conclude that none of the defendants violated Jones' right to due process, and they are thus entitled to qualified immunity.

Unpublished Opinion, p. 13.

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> He was represented by counsel. Twenty-one days after the summary suspension, a three member panel of the Pharmacy Board heard his motion to stay and modify the summary suspension order. Each time Jones and his pharmacy received a failing score, the Board reinspected the pharmacy in accordance with WAC 246-869-190. Finally, when the Board issued the summary suspension, Jones had an opportunity to be heard before the Board at a September 10, 1999 prompt hearing.

Unpublished Opinion, p. 15.

focusing on what took place after the deprivation, the Court's opinion suggests that Jones suffered no due process violation precisely because he was afforded sufficient post-deprivation process. While this may be true in instances where the deprivation itself stems from a random and unauthorized act that cannot be foreseen (*see, e.g. Parratt v. Taylor*, 452 U.S. 527 (1981)[3] and *Hudson v. Palmer*, 468 U.S. 517 (1984)),[4] this is not true in instances like this one, where the deprivation stems from a deliberate act or policy. *Zinermon v. Burch,* 494 U.S. 113, 127-28 (1990).

In *Zinermon*, a patient who was "voluntarily admitted" to a state mental hospital based on forms he filled out while heavily medicated and suffering from a psychotic disorder brought a § 1983 claim against the doctors who admitted him, alleging that he was incompetent when he

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[3] In *Parratt, supra,* a state prisoner sued the state under § 1983 after a prison employee negligently lost materials the prisoner had ordered by mail. The prisoner had available to him a tort-claim procedure which would have afforded him a remedy for the lost mail. Nevertheless, the prisoner brought a § 1983 claim based on the Constitution's Due Process clause under the theory that the lost mail amounted to a deprivation of property without prior process. The Supreme Court noted that given the random and unauthorized nature of the deprivation – a negligent misplacing of mail – it was not possible for the state to provide a pre-deprivation remedy; therefore, in this narrow circumstance, so long as the state provided a reasonable post-deprivation remedy (the tort-claim procedure) there could be no claim based on procedural due process.

[4] In *Hudson, supra,* a state prisoner brought a § 1983 claim based on a prison guard's deliberate destruction of the prisoner's property. Once again, the prisoner alleged that the deprivation of property was done without a hearing and therefore violated the Constitution's Due Process Clause. The Supreme Court extended the holding to *Parratt* (which involved negligent acts) to include intentional acts when those acts are "random and unauthorized" and therefore unforeseeable by the state.

signed the forms and should not have been admitted to the hospital (and thereby deprived of his liberty) without a hearing to determine his competence. The state moved to dismiss the § 1983 claim based on the holdings of *Parratt* and *Hudson*, *supra*: namely, the doctors' admission of the patient according to the "voluntary admission" forms were "random and unauthorized" acts and that therefore the *post*-deprivation remedy of a damages claim was sufficient to satisfy the due process clause. The Supreme Court rejected the argument and ruled that because it was possible for the doctors to conduct a hearing to determine a person's competence to "volunteer" for admission to the mental hospital, they must conduct a *pre*-deprivation hearing to comport with due process. The Court's ruling made it clear that the holdings of *Parratt* and *Hudson* were narrow exceptions to the due process requirements of a hearing prior to any deprivation of property or liberty. *Zinermon, supra,* 136–39.

Jones's § 1983 claim is not based on the fact that the Board of Pharmacy ultimately suspended his licenses; Jones's § 1983 claim is based on the fact that his licenses were suspended *ex parte* -- without notice and an opportunity to be heard. Executive Director Williams had the authority and opportunity to give Jones notice and an opportunity to be heard at the hearing but failed to do so. Williams had the authority and opportunity to seek to suspend Jones's licenses pursuant to a regular adjudicatory hearing

– rather than an *ex parte* hearing – but failed to do so. Because Williams had the authority and opportunity to provide Jones with a pre-deprivation hearing, this case is like *Zinermon*, *supra,* and not like *Parratt* and *Hudson*, *supra.*

The Court's opinion either fails to recognize that the constitutional violation took place when the summary suspension was issued, or it mistakenly treats that violation as a *Parratt* or *Hudson* problem instead of as a *Zinermon* problem. Either way, the Court got it wrong, and its opinion conflicts with the federal constitutional law of due process. RAP 13.4(b)(3).

B. The Court's opinion ignores the central legal and constitutional issue: When does a fact question about a government official's reasonable belief in the existence of a public emergency preclude summary judgment on the issue of qualified immunity under § 1983?

The only relevant exception to the due process requirement of pre-deprivation notice and opportunity to be heard is the existence of a public emergency that makes it impracticable to provide such notice.

> Summary governmental action taken in emergencies and designed to protect the public health, safety and general welfare does not violate due process. *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 299-300, 101 S.Ct. 2352, 2372-73, 69 L.Ed.2d 1 (1981); *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306, 319-20, 29 S.Ct. 101, 105-06, 53 L.Ed. 195 (1908). Government officials need to act promptly and decisively when they perceive an emergency, and therefore, no pre-deprivation process is due. However, the rationale for permitting government

> officials to act summarily in emergency situations does not apply where the officials know no emergency exists, or where they act with reckless disregard of the actual circumstances. *Sinaloa Lake Owners Ass'n v. Simi Valley*, 882 F.2d 1398, 1406 (9th Cir.1989), cert. denied, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990) . . . .

Armendariz v. Penman, 31 F.3d 860, 866 (9th Cir. 1994) (*r'vsed on other grounds*, *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996)).

Jones demonstrated the existence of a material fact question about whether the government officials reasonably believed that an emergency existed that would justify summary action.

- Jones testified that the inspections contained numerous errors and that the grading of any deficiencies that did exist was arbitrary, capricious and done in bad faith in order to submit his pharmacy to a failing score. (CP 215).

- Jones testified that the condition of his pharmacy on July 12, 1999 (when he received a failing score of 48) was virtually the same as the condition of his pharmacy on February 3 – when he received a passing score of 96. The only difference in the two inspections is the false reports made by Wene and Jeppesen and the scoring of the deficiencies. (CP 214).

- Jones testified that the false and capricious scoring of his pharmacy was part of a conspiracy to force the closure of his pharmacy. (CP 215).

- Jones's pharmacy received a passing score of 96 on February 3 even though virtually all of the circumstances that led to the failing score on July 12 were present February 3: the functionality of the QS-1 system, the recordkeeping for non-child resistant caps, the recordkeeping for Schedule II drugs.

- Jones's pharmacy was allowed to remain open for more than five weeks after it received a failing score of 48 on July 12, and

> for seven days after it received a failing score on August 10. If an emergency existed, Jones's pharmacy would have been shut down immediately. (CR 214-17).

When these facts are viewed in the light most favorable to Respondent, the existence – or non-existence – of an emergency remains a question of fact. *Weinberg v. Whatcom County*, 241 F.3d 746, 754 (9th Cir. 2001) (questions of fact remained about the existence of an emergency that justified issuance of stop work orders on construction project, but plaintiff developer was entitled to summary judgment on his § 1983 procedural due process claim based on county officials' vacation of his approved plats without a hearing). *See also, Kerman v. City of New York,* 374 F.3d 93, 108-9 (2d Cir. 2004).

The Court's opinion makes reference to the possible existence of an emergency,[5] but it fails to analyze properly the legal significance of this fact. The Court should have analyzed Jones's due process claim with reference to *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264 (1981), and other cases involving summary deprivations and post-deprivation hearings. Instead, the Court analyzed Jones' due process claim with reference to *Mathews v. Eldridge,* 424 U.S. 319 (1976) and other cases involving the adequacy of pre-deprivation notice and

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[5] *Unpublished Opinion, fn* 26.

opportunity to be heard. *See Unpublished Opinion, pp. 14-16* ("Under the Matthews *(sic)* test, there was no violation of Jones' rights.") *Mathews* is not on point because Jones had no notice of or opportunity to be heard at the hearing on the state's Ex Parte Motion for Summary Action.

By analyzing Jones' due process claim with reference to *Mathews* and its progeny (instead of *Hodel* and its progeny), the Court's opinion applies the wrong law and misstates the constitutional protections against summary government action. More specifically, the Court's opinion fails to analyze properly the question of when a factual dispute about the reasonableness of a government official's belief in an emergency defeats a motion for summary judgment based on a claim of qualified immunity under 42 U.S.C. § 1983. This failure presents a conflict with the existing law of 42 U.S.C. § 1983 and presents a significant question of federal constitutional law. RAP 13.4(b)(1) and (3).

C. The Court's discussion of the doctrine of Exhaustion of Administrative Remedies conflicts with existing case law, and the issue is one of substantial public interest.

The Court's opinion holds that Jones lost his state-law claims by failing to exhaust his administrative remedy. *Id., pp 18-20. (*citing *Laymon v. Dept. of Natural Resources,* 99 Wn.App. 518, 994 P.2d 232 (2000)). Its holding misreads *Laymon* (RAP 13.4(b)(2)) and presents such

a broad application of the exhaustion doctrine as to raise an issue of substantial public interest. RAP 13.4(b)(4).

In *Laymon* the plaintiff failed to seek any administrative remedy in response either to the stop work order issued by the Department of Natural Resources or the bald eagle management plan presented by the Department of Fish and Wildlife. Had the plaintiff sought an administrative remedy, the court ruled that he might have been able to prevent the financial backers for his development project from withdrawing their funds. Therefore, the court ruled that the *Laymon* plaintiff's judicial claims for damages were barred because he failed to attempt to mitigate his damages in an available administrative proceeding.[6]

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> Where, as here, the aggrieved party fails to show that it attempted to use the appropriate administrative appeals process, the trial court may properly dismiss the claim. *CLEAN,* 133 Wn.2d at 465, 947 P.2d 1169.
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> Moreover, a government defendant's claim that a plaintiff failed to exhaust administrative remedies before filing a tort action is really a question of proximate cause. *Wolfe v. Bennett PS&E, Inc.,* 95 Wn.App. 71, 81 n. 7, 974 P.2d 355, *review denied,* 139 Wash.2d 1003, 989 P.2d 1140 (1999). Proximate cause consists of cause in fact and legal causation. *City of Seattle v. Blume,* 134 Wn.2d 243, 251, 947 P.2d 223 (1997); *Hartley v. State,* 103 Wn.2d 768, 777, 698 P.2d 77 (1985).
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> "Legal causation rests on policy considerations determining how far the consequences of a defendant's acts should extend." *Blume,* 134 Wn.2d at 252, 947 P.2d 223; *Wolfe,* 95 Wn.App. at 81, 974 P.2d 355. A court "must decide based on traditional principles of proximate causation whether or not a defendant was the cause of the injuries suffered and whether the duty to mitigate was met." *Blume*, 134 Wn.2d at 260, 947 P.2d 223. Consequently, a plaintiff's failure to employ available legal remedies to avoid resulting damages is analogous to a failure to mitigate damages. [Footnote omitted] *See Blume*, 134 Wn.2d at 260, 947 P.2d 223.

Unlike the plaintiff in *Laymon,* Jones did pursue administrative remedies in response to the summary suspensions of his licenses.

- On August 27, 1999, Jones filed a motion to modify the Ex Parte Order of Summary Action and to stay the summary suspensions pending a hearing on the merits of the allegations contained in the Statement of Charges. The motion and supporting declarations established that Jones' business would suffer irreparable harm if he were not permitted to reopen pending the outcome of the hearing on the merits.

- On September 1, 1999, the Department of Health, Board of Pharmacy filed its opposition to Jones' motion for a stay of the summary suspensions. The Department of Health argued, in part, that Jones' motion to modify should be denied because it was moot. The Department's mootness argument was based on the fact that Jones' franchise had been terminated. On September 7, 1999, the Board of Pharmacy denied Jones' motion to modify the summary suspensions of his licenses.

- Jones continued to pursue administrative actions to overturn the summary suspensions, and the state continued to oppose any expedited hearing on the matter. By November 1999, Jones had lost his lease, his business, and the financial wherewithal to continue to pursue the administrative remedy. He entered a stipulated order that sacrificed his pharmacy license but provided for a suspended professional license.

The Court's opinion holds that Jones's state-law claims are barred because he failed to request an expedited hearing that might have saved his business.[7] The Court's opinion overlooks the fact that Jones's franchise

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Laymon, at 526.

[7] Had Jones requested a prompt hearing, he could have immediately challenged the Statement of Charges and the Pharmacy Board could have evaluated the accuracy of the investigators' report. But Jones waived his right to a prompt hearing on September 10, 1999, and was not entitled to an expedited hearing before the next

(and his source of pharmaceuticals) had already been terminated, effective August 31, as a result of the summary suspensions of his license. An expedited hearing would not have mitigated the substantial damages associated with this loss of franchise – losses that had already occurred as a result of the summary suspensions.

Of greater concern, the Court's opinion appears to direct the trial court to review a plaintiff's strategic decisions during an administrative proceeding (and to speculate about the possible outcomes of an alternative strategic decision) when deciding whether a plaintiff failed to exhaust its administrative remedies. In this case, Jones repeatedly requested a speedy resolution of the dispute, and his requests were repeatedly opposed by the state and denied by the administrative law judge. The Court's rule suggests that a trial court should second guess a plaintiff's strategic decisions in administrative proceedings when applying the doctrine of exhaustion of administrative remedies. Such a rule would encourage unnecessary gamesmanship in administrative proceedings and is unworkable.

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regularly scheduled date. The delay that took place between the date when the prompt hearing could have been held and the date the adjudicative hearing was ultimately scheduled was not caused by the Department or the individual defendants but by Jones' own strategic decisions.
Unpublished Opinion, pp. 19-20.

The better rule is the one articulated in *Laymon*: Might the pursuit of an administrative remedy have mitigated plaintiff's damages? If so, then the failure to pursue an administrative remedy bars the pursuit of a judicial remedy that seeks those same damages. In *Laymon,* the plaintiff could have immediately appealed either the stop work order or the bald eagle management plan, and either appeal could have saved the financial backing for his development plan. The *Laymon* plaintiff pursued neither administrative remedy, and the court barred his pursuit of a judicial remedy.

In this case, Jones did seek an administrative remedy; he did seek an immediate stay of the suspensions; and he did oppose the Board of Pharmacy charges. It was only after he had lost everything that he entered the stipulated order. Had Jones pursued the administrative remedy to its bitter end and prevailed, he would still have lost his pharmacy franchise, his lease, and his business; fighting on in the administrative proceeding would not have mitigated Jones's damages. Therefore, the Court erred in deciding that his state law claims were barred by a failure to exhaust administrative remedies.

VI. CONCLUSION

Jones asks the Court to overturn the Court of Appeals and rule:

1. Issue of material fact about whether Williams, Wene and Jeppesen reasonably believed an emergency existed to prevent the summary determination that they are entitled to qualified immunity from Jones's 42 U.S.C. § 1983 claim.

2. Jones was not required to continue pursuing his administrative remedies once it became clear that the administrative action would not mitigate his damages, and his state law claims survive.

Based on these rulings, the Court should reinstate Jones's claims and remand the matter to the trial court.

RESPECTFULLY SUBMITTED this 8th day of October, 2007.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL S. JONES, R.Ph., Respondent, v. STATE OF WASHINGTON; STATE OF WASHINGTON, DEPARTMENT OF HEALTH; STATE OF WASHINGTON, DEPARTMENT OF HEALTH, BOARD OF PHARMACY; PHYLLIS WENE; and STAN JEPPESEN, individually and as investigators for the Washington State Board of Pharmacy and DONALD WILLIAMS, individually and as executive director of the Board of Pharmacy, Appellants.	)	No. 57850-2-I DIVISION ONE UNPUBLISHED OPINION FILED: June 4, 2007

AGID, J. -- Michael Jones purchased a pharmacy franchise in Marysville, obtained a pharmacy license for it, and became its sole licensed pharmacist. From 1996 through 2000, the Washington State Board of Pharmacy (Board) inspected Jones' pharmacy on several occasions. Because he received two consecutive unsatisfactory inspection scores and had violations the Board found were an immediate danger to the public, it summarily suspended Jones' licenses. He eventually entered into a stipulated order agreeing to a five year suspension of his

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pharmacy license. Jones later sued the Board, Donald Williams, the Board's Executive Director, and investigators Phyllis Wene and Stan Jeppesen for numerous torts and violation of his civil rights under 42 U.S.C. § 1983. On summary judgment, the trial court denied the Department of Health's (Department) motion to dismiss Jones' claims and ruled that none of the individual defendants were entitled to immunity. We granted discretionary review of these rulings.

We hold there was no basis in law to deny immunity to the individual defendants. Williams, who functioned as a prosecutor when filing the summary suspension and statement of charges against Jones, was entitled to absolute immunity. Because Jones failed to establish any violation of a constitutional right, Wene and Jeppesen should have been granted qualified immunity and the section 1983 claims dismissed. Finally, the trial court erroneously denied the Department's motion for summary judgment on the state law torts because Jones failed to exhaust available administrative remedies.

We therefore reverse and remand for entry of an order granting the Department's motion dismissing Jones' suit.

FACTS

In 1995, Michael Jones, a licensed pharmacist, purchased a pharmacy franchise, The Medicine Shoppe, and obtained a pharmacy license. Jones was the only licensed pharmacist at this pharmacy. On December 17, 1998, the Board inspected The Medicine Shoppe and gave it a failing inspection score of 79. This inspection uncovered the following violations:

[1] Failing to obtain chronic conditions on patients of the pharmacy;

[2] Dispensing the majority of prescriptions in non child-resistant containers without a written request from either the patient or the prescriber;

[3] Various records required by state and federal law were either inaccurate, incomplete or not available;

[4] There was a box of filled prescription containers, many unlabeled, on the floor of the pharmacy.

[5] Investigator Wene discovered a prescription filling error in the will call area. . . .;

[6] Many of the prescriptions in the will call area had labeled expiration dates exceeding the manufacturer's expiration date;

[7] Most of the prescriptions in the will call area contained the incorrect NDC number for the product in the prescription container[.]

Board of Pharmacy Investigator Phyllis Wene reinspected the pharmacy on February 3, 1999, and gave it a passing score of 94. The inspectors deducted points for inaccurate, incomplete or missing records.

On July 12, 1999, Inspectors Wene and Stan Jeppesen inspected The Medicine Shoppe and gave it an unsatisfactory score of 48 for the following violations:

[1] Failing to obtain chronic conditions and allergies on patients of the pharmacy. Disease state management . . . not readily readable by the Pharmacist[;]

[2] Numerous (greater than 10) prescriptions were labeled with a different generic product than indicated on the label or NDC Code. Several of these prescriptions were dispensed in the presence of Board of Pharmacy Investigators[;]

[3] Dispensing the majority (in excess of 90%) of prescriptions in non child-resistant containers without a written request from either the patient or the prescriber for non child-resistant packaging[;]

[4] Thirty-eight (38) drug products were outdated. Of those, 18 drugs were legend or controlled substances and 20 were OTC products[;]

[5] Various records required by federal law (DEA [Drug Enforcement Administration]) were either inaccurate, incomplete or not available. DEA order forms and invoices could not be reconciled. Respondent was unable to locate several required DEA forms. There was poor organization of DEA inventory records, including non-sequential filing. Several DEA records did not include date and amount received on DEA 222 forms[;]

[6] DEA Inventory incomplete, DEA inventory for Schedules III-V was missing. Respondent was unable to generate reports for Schedule II drugs. The daily refill reports were not signed, stored in various locations, out of sequence, with several months not located[;][1]

[7] Facts and Comparisons, the only reference source in the pharmacy, had not been updated for at least nine (9) months[;]

[8] Pharmacy Assistant did not have a name badge and none had been ordered. No Pharmacy Assistant certificate has been generated or signed. Modifications to the Pharmacy Assistant Utilization Plan were in place without Board approval[;]

[9] The prescription records were inaccurate, missing and poorly organized. Examples include prescription files with non-sequential order. Several prescriptions, both C-II and other drugs were unaccounted for. Prescription files were kept with no organization. Respondent Jones was unable to locate files in a timely manner[;]

[10] Minimum procedures for utilization of the patient medication system were inadequate[;]

[11] During the inspection, patient returned a prescription so that Respondent Jones could correct the instructions for use. The correction was made but no audit trail of the change was entered in the pharmacy computer[;]

[12] The pharmacy was generally disorganized and dirty. The pharmacy sink and immediate area were dirty and with numerous dirty food dishes.

Wene and Jeppesen reinspected the pharmacy on August 10, 1999, and gave it another unsatisfactory score of 56 based on several wrongly filled prescriptions and the following non-exhaustive list of violations:

[1] Six prescriptions selected randomly in the will call area did not have allergy or chronic conditions noted in the patient profile. The disease state – drug interaction fields [on the computer] had been turned off. Respondent Jones was unable to explain the purpose or the clinical significance of the clinical interaction levels that appeared for drug interaction messages[;]

[2] Three prescriptions selected randomly from the will call area were labeled with a different generic product than indicated on the label and/or NDC Code[;]

[3] Forty-one (41) prescriptions were located in the will call area. Of those, forty (40) were packaged in non child-resistant containers and the

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[1] Findings 4-6 refer to drugs classified as narcotics and other controlled substances under state and federal law.

> one that was in a child resistant container was in a container supplied by the manufacturer[;]
>
> [4] Eleven legend or controlled substances on the shelf were beyond the manufacturer's expiration date[;]
>
> [5] As in the July 12, 1999 inspection, various records required by federal law (DEA) were either inaccurate, incomplete or not available. . . .
>
> [6] DEA Inventory records were incomplete. . . .
>
> [7] Five prescriptions which had been filled and returned to the stock area were checked for accuracy of product on the label and against correct NDC numbers. All five prescriptions failed to comply with state and/or federal law. . . .

On August 16, 1999, Board of Pharmacy Executive Director Donald Williams filed a statement of charges and an ex parte motion for an Order of Summary Suspension of Jones' and The Medicine Shoppe's licenses and with the Board of Pharmacy. The next day, the Board granted the summary suspension motion, and Wene served Jones with the Statement of Charges, Ex Parte Order of Summary Action and a Notice of Opportunity of Settlement and Hearing.

On August 30, 1999, Jones filed a Motion to Modify and Stay the summary suspension, contesting the allegations. To support this motion, he filed his own declaration and one from his attorney which stated that the inspectors acted unprofessionally during their inspection and assured the Board of Pharmacy that he held his patients' safety in the highest regard. He argued that, while he may have been disorganized, his actions did not constitute unprofessional conduct or represent any threat to the health, safety, or welfare of his customers. He also claimed that portions of the inspection report were inaccurate. For example, he asserted the August 1999 report penalized him twice for prescriptions without proper NDC numbers because those same prescriptions had been in the pickup bin since the time of the first inspection. He maintained that his recordkeeping on non child resistant caps may have

been difficult to verify but did not pose a safety concern. He demanded immediate reinstatement of his licenses in order to avoid severe financial hardship. Effective August 31, 1999, The Medicine Shoppe International terminated Jones' franchise because of the summary suspensions.

On September 2, 1999, the Presiding Officer conducted a telephone conference with the parties. During this conference, Jones asked the Board to consider his motion as soon as a meeting time could be arranged, but he elected not to present oral argument. The Presiding Officer told Jones that by filing a written motion he had waived his right to the prompt hearing set for September 10, 1999, but he could move for an expedited hearing if his motion was denied.

On September 7, 1999, a three member panel of the Board denied Jones' motion, finding that he had committed serious violations by operating the pharmacy below the standard of care. The Board ruled that the summary suspension would remain effective because Jones had a history of violating pharmacy laws, correcting those violations, and later violating other pharmacy laws.

On September 13, 1999, Jones petitioned for an expedited hearing, asserting that he would suffer financial ruin if he could not resolve the matter and immediately reopen his pharmacy. In his motion, Jones acknowledged that he was no longer entitled to have the matter heard on the prompt hearing calendar. The Department objected to his request to set the matter outside the Board's regularly scheduled hearing dates because he had waived his right to a prompt hearing. Although the Board's Presiding Officer granted Jones' motion and scheduled the hearing for October 21, 1999, he also noted that Jones had waived his right to a prompt hearing in his Answer.

On September 22, 1999, Jones requested an immediate settlement conference to resolve the charges. The parties met at an October 13 prehearing conference, at which time another prehearing conference was set in order to allow the Department time to amend the Statement of Charges against Jones. The Department also moved for a continuance to the Board's next regularly scheduled meeting on December 2, 1999. Jones opposed the motion on the ground that additional delay would cause him greater financial hardship. The Presiding Officer granted the Department's motion to continue because the later hearing date would further judicial economy by allowing joinder of additional pending charges. The Presiding Officer also ruled that Jones' actions were a risk to the public. He rescheduled the hearing to the Board's next meeting date. A new prehearing conference was scheduled for November 11, 1999.[2]

On January 11, 2000, Jones entered into Stipulated Findings of Fact, Conclusions of Law, and an Agreed Order, under which he agreed that the facts contained in the investigators' reports from December 1998, July 1999, and August 1999 constituted unprofessional conduct. Under the terms of the order, the Board revoked Jones' pharmacy license for The Medicine Shoppe and suspended his professional license for five years from February 17, 2000.[3]

Jones filed a complaint in Snohomish County Superior Court against Executive Director Williams, investigators Wene and Jeppesen, the State, the Department of Health and the Board of Pharmacy seeking injunctive relief and monetary damages for

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[2] Jones alleges that by November, he had lost his entire business, his franchise, and his commercial lease.

[3] On appeal, Jones argues he signed the stipulated order because he no longer had the financial wherewithal to pay for an attorney and challenge the Board of Pharmacy and could not afford risking his professional license.

negligence, reckless investigation, tortious interference with a business expectancy, and violation of his due process rights under 42 U.S.C. § 1983. The Department moved for summary judgment, arguing that Executive Director Williams was entitled to absolute prosecutorial immunity and that all individual defendants were entitled to qualified immunity on Jones' civil rights claims. It moved for summary dismissal of all of Jones' state law claims because he had agreed to the license suspension and waived additional hearing rights when he signed the stipulated order. The Department also filed a motion to strike portions of Jones' declarations as hearsay. These included Jones' rendition of out-of-court statements by pharmacists Sharla Keeling and Claudia Tomlinson and conversations between his attorney, Bernie Bauman, and members of the Board.

The court partially granted the Department's motion for summary judgment, dismissing Jones' claims for negligent investigation and injunctive relief.[4] But it denied the Department's motion on the remaining claims, ruling that the defendants were not entitled to absolute or qualified immunity and that the stipulation did not preclude Jones from asserting tort claims against the Department. The trial court granted the Department's motion to strike the hearsay portions of Jones' declaration. But, it said it would consider portions of his declaration as "background." On February 13, 2000, the Department filed a motion for reconsideration. On May 17, 2000, the trial court granted the Department's motion in part, dismissing Jones' claim for recklessness based on his agreement that the claim should be dismissed. We granted discretionary review of the

[4] Jones agreed to dismiss his claim for injunctive relief and did not oppose the Department's motion to dismiss his claims for negligent investigation.

court's rulings on immunity and Jones' remaining state tort law and 42 U.S.C. § 1983 claims.

DISCUSSION

We review summary judgment orders de novo, making the same inquiry as the trial court and considering all facts and reasonable inferences in the light most favorable to the nonmoving party.[5] Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[6] A material fact is one upon which the outcome of the litigation depends.[7] Questions of fact may be determined as a matter of law when reasonable minds can reach only one conclusion.[8]

The Department asserts that the trial court made an error of law by failing to grant its motion for summary judgment and dismiss all claims against Williams, Wene, and Jeppesen. It argues that these defendants were entitled to immunity and that RCW 18.130.050 expressly authorized the Board to summarily suspend Jones' licenses because his violations posed a danger to the public. According to the Department, Williams, Wene, and Jeppesen are entitled to immunity because pharmacy regulators must be allowed to act independently and without fearing liability when performing their duty to ensure that Washington pharmacists comply with state and federal health and safety laws.

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[5] Suquamish Indian Tribe v. Kitsap County, 92 Wn. App. 816, 827, 965 P.2d 636 (1998) (citing Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994)).

[6] CR 56(c); City of Sequim v. Malkasian, 157 Wn.2d 251, 261, 138 P.3d 943 (2006).

[7] Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997).

[8] Hartley v. State, 103 Wn.2d 768, 775, 698 P.2d 77 (1985) (citing La Plante v. State, 85 Wn.2d 154, 531 P.2d 299 (1975); Balise v. Underwood, 62 Wn.2d 195, 381 P.2d 966 (1963)).

I. Absolute Immunity

The Department argues that the trial court erred as a matter of law by not conferring absolute immunity on Executive Director Williams and dismissing all claims against him because Jones' claims against him are premised on prosecutorial conduct. The Department asserts that absolute prosecutorial immunity is not limited to prosecuting attorneys but extends to administrative agency officials who initiate disciplinary proceedings. We agree.

Whether a government official is entitled to absolute immunity is a question of law that can be properly decided on summary judgment.[9] In Hannum v. Freidt, we held that the Director of the Department of Licensing (DOL) was entitled to prosecutorial immunity because she performed a prosecutorial function when she charged Hannum and summarily suspended his vehicle dealer license.[10] We also held that a DOL Investigator was entitled to absolute immunity because she acted in a prosecutorial role when she recommended summary suspension of Hannum's dealer license.[11] These rulings reflect the policy that administrative agency officers who initiate administrative adjudications should be shielded by absolute prosecutorial immunity because the discretion they exercise when initiating an adjudicative matter "'might be distorted if their immunity from damages arising from that decision was less than complete.'"[12]

Jones argues that Hannum does not apply because DOL agents are authorized by statute to summarily suspend driver's licenses and the Executive Director of the

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[9] Hannum v. Freidt, 88 Wn. App. 881, 887, 947 P.2d 760 (1997).
[10] 88 Wn. App. 881, 889, 947 P.2d 760 (1997).
[11] Id.
[12] Id. at 888-89 (quoting Butz v. Economou, 438 U.S. 478, 515, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978)).

Board of Pharmacy is not. He also asserts that Williams' role was investigatory, not prosecutorial, because an Assistant Attorney General prosecuted the case.

Absolute prosecutorial immunity is proper when an official's conduct is the functional equivalent of the acts a prosecutor would perform in the course of deciding whether to prosecute and initiating prosecution. The official need not do everything a prosecutor would do.[13] The Administrative Procedures Act applies to the adjudicative procedures of the Board of Pharmacy.[14] Whether or not an Assistant Attorney General brought the case before the Board, Williams' recommendation to summarily suspend Jones' licenses was no different from the actions of the DOL investigator in Hannum, who was entitled to absolute prosecutorial immunity for substantially the same decisions and actions. Charging decisions and filing a Statement of Charges are traditional prosecutorial functions.[15] When an administrative officer exercises discretion in deciding whether to suspend a license, that officer is also entitled to absolute immunity. Jones' presented no evidence to show that Williams participated in the investigation, directed Wene's and Jeppesen's actions or did anything other than decide that summary suspension was warranted. Accordingly, we hold that the trial court made an error of law by not granting the Department's motion to dismiss Executive Director Williams from the lawsuit based on absolute immunity.

II. Qualified Immunity § 1983 Claims

The Department argues that all three defendants were entitled to qualified immunity, and the trial court should have dismissed them on that basis because Jones

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[13] See id.
[14] RCW 18.13.100; WAC 246-869-001.
[15] Kalina v. Fletcher, 522 U.S. 118, 127, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997).

failed to show the violation of a clearly established constitutional right. It also contends the trial court should have dismissed this action because RCW 18.130.050(7) expressly authorizes summary suspension, without a pre-deprivation hearing, under emergency circumstances. While it is not entirely clear what constitutional right Jones relies on for his section 1983 claims, his allegations and briefing appear to allege that he was denied procedural due process.

Qualified immunity protects government officials from insubstantial and harassing litigation without foreclosing suits for damages that may be the only avenue for the vindication of constitutional rights.[16] Qualified immunity is a judicially created doctrine that stems from the premise that few people would enter public service if it entailed the risk of personal liability for official decisions.[17] Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[18] Immunity, whether absolute or qualified, "spare[s] a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit."[19]

Defendants are entitled to summary judgment based on qualified immunity if plaintiffs' complaint fails to state a claim[20] or, in light of clearly established principles governing their conduct, they objectively could have believed their conduct was lawful,[21] or when there is no genuine issue of material fact about whether they engaged in

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[16] Robinson v. City of Seattle, 119 Wn.2d 34, 62, 830 P.2d 318, cert. denied, 506 U.S. 1028 (1992).

[17] Malley v. Briggs, 475 U.S. 335, 339, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986).

[18] Hunter v. Bryant, 502 U.S. 224, 112 S. Ct. 534, 537, 116 L. Ed. 2d 589 (1991) (quoting Malley, 475 U.S. at 343).

[19] Siegert v. Gilley, 500 U.S. 226, 232, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991).

[20] Id. at 233.

[21] Anderson v. Creighton, 483 U.S. 635, 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

conduct violating a plaintiff's clearly established constitutional rights.[22] Once the defendant asserts qualified immunity, the plaintiff must establish that the defendant violated a clearly established constitutional right in order to survive summary judgment.[23] Jones claims the individual defendants violated his due process rights when they suspended his licenses. But the suspension was authorized by law, and we conclude that none of the defendants violated Jones' right to due process, and they are thus entitled to qualified immunity.

WAC 246-869-190 authorizes the Board of Pharmacy to inspect Washington pharmacies.[24] When a pharmacy receives an unsatisfactory score, it must raise its score to a satisfactory level score of 90 or better within 14 days.[25] RCW 34.05.479 authorizes agencies to use emergency adjudicative actions when there is an immediate danger to the public health. In July 1999 and again in August 1999, Jones received an unsatisfactory score, even though he had been given an opportunity to correct his violations. Upon reinspection, the investigators found that several of the violations were still not addressed, including DEA records for Schedule II drugs and records of customer requests for non child resistant containers (non-CRCs). The investigators also found prescriptions with incorrect NDA numbers in the customer pickup bins, which Jones admitted had been there since the time of the last inspection.[26] While he claimed

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[22] Burgess v. Pierce County, 918 F.2d 104, 106 n.3 (9th Cir. 1990).

[23] Id.

[24] During inspections, pharmacies are scored on a 0 to 100 scale and classified into three categories: "Class A" for scores from 90-100; "Conditional" for scores from 80-89; and "Unsatisfactory" for scores below 80. WAC 246-869-190(3)(a)(b)(c).

[25] WAC 246-869-190(5).

[26] To support the Pharmacy Board's finding of an emergency necessitating summary suspension of a pharmacy license, the Department cites to numerous cases involving acts similar to Jones' admissions. These examples include prosecution under the Controlled Substances Act for the type of insufficient Schedule II records Jones acknowledged, see, e.g.,

in this lawsuit that the inspection reports were in error, his August 1999 declarations admitted these facts were true. RCW 34.05.479 expressly authorizes the agency to use emergency adjudicative actions when there is an immediate danger to the public health. And under RCW 18.130.050(7), WAC 246-869-190(8) and WAC 246-11-300, the Board can take emergency action and summarily suspend a pharmacist's license pending further disciplinary proceedings if, after reviewing the evidence, it determines that only summary action will address an immediate danger to public health, safety, or welfare. Given the serious nature of the violations, the Board had statutory authority to summarily suspend Jones' licenses.

Jones argues that the Board violated his due process rights, apparently because he did not receive a pre-deprivation or expedited hearing.[27] Where an individual possesses a constitutional property interest, due process requires that he be given notice and a meaningful opportunity to a hearing before he is deprived of that interest.[28] We must balance three factors to determine the nature of the procedural protections required: (1) the gravity of the private interest affected; (2) the risk of erroneous deprivation under the current procedure and the probable value, if any, of additional

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United States v. Poulin, 926 F. Supp. 246 (D. Mass. 1996), and cases demonstrating real harm to individual patients when a pharmacist failed to keep proper records. See, e.g., Wahba v. H & N Prescription Ctr., Inc., 539 F. Supp. 352 (E.D.N.Y. 1982) (two year old died after ingesting 20 pills that were dispensed to mother by pharmacist in non child resistant container); Baker v. Arbor Drugs, 215 Mich. App. 198, 544 N.W.2d 727 (1996), appeal denied, 454 Mich. 853 (1997) (pharmacy patient suffered stroke after pharmacist filled prescriptions for two incompatible drugs because pharmacist failed to properly utilize computer system that would have warned of the adverse drug reaction).

[27] Jones also asserts that the defendants participated in a conspiracy against him to destroy his business and filed a summary suspension based on false accusations. He contends Wene and Jeppesen were highly unprofessional and instituted proceedings against him based on an arbitrary scoring system. Jones did not present any admissible evidence to support these allegations below. Accordingly, we do not address any allegations that the defendants violated his right to substantive due process.

[28] Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

procedural safeguards; and (3) the interest of the government, including the burdens of additional or substitute procedures.[29] As discussed above, the governmental interest here was important because Jones' violations threatened the health and well-being of his patients. And he received all the process that was due. Jones received notice of the summary suspension and of all later charges and hearings associated with his professional licenses. He was represented by counsel. Twenty-one days after the summary suspension, a three member panel of the Pharmacy Board heard his motion to stay and modify the summary suspension order. Each time Jones and his pharmacy received a failing score, the Board reinspected the pharmacy in accordance with WAC 246-869-190. Finally, when the Board issued the summary suspension, Jones had an opportunity to be heard before the Board at a September 10, 1999 prompt hearing.

Once a summary suspension is filed, under WAC 246-11-330 a pharmacist can respond in several ways:

> (1) Request a prompt adjudicative proceeding conducted in accordance with this chapter; or
> (2) Waive the prompt adjudicative proceeding and request a regularly scheduled adjudicative proceeding conducted in accordance with this chapter;
> (3) Waive the right to an adjudicative proceeding and submit a written statement to be considered prior to the entry of the final order; or
> (4) Waive the opportunity to be heard.

By filing his motion to stay and modify the order and failing to request a prompt hearing within 10 days of service, Jones waived his right to a prompt hearing and knew that he was doing so when he filed his motion. Had he sought a prompt hearing, Jones would have had an opportunity to meet with the Board in mid-September and may have avoided the damages he now alleges. Nor did the Department violate his right to due

[29] Mathews, 424 U.S. at 335.

process simply because it opposed his later motion for an expedited hearing. Finally, Jones also waived his opportunity for a more extensive hearing on the merits of his suspended licenses by stipulating to a five year suspension before the scheduled hearing could take place. No further process would have protected Jones' rights, even if he had not waived his right to an early hearing. Jones failed to raise a material issue of fact or to establish that he was entitled to more process than he received. Under the Matthews test, there was no violation of Jones' rights. Wene and Jeppesen were therefore entitled to qualified immunity. The trial court erred in denying the Department's motion to dismiss the claims against them.

III. Evidentiary Rulings

The Department asserts the trial court erred by ruling there were genuine issues of material fact based on Jones' declaration because it contained inadmissible hearsay and contradicted the earlier declarations he submitted to the Board, a quasi-judicial body. It also asserts that the trial court should have applied the doctrine of judicial estoppel to Jones' declaration because it contradicted earlier declarations. Jones asserts that the declarations were admissible because evidence not offered for the truth of the matter asserted is not hearsay under ER 801(c). We disagree with Jones' position.

On summary judgment, the court's function is to determine whether a genuine issue of material fact exists; it is not to resolve an existing factual issue.[30] When ruling on a summary judgment motion, a court cannot consider inadmissible evidence.[31]

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[30] Thoma v. C. J. Montag & Sons, Inc., 54 Wn.2d 20, 337 P.2d 1052 (1959).

[31] CR 56(e); King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County, 123 Wn.2d 819, 826, 872 P.2d 516 (1994).

Here, the trial court granted the Department's motion to strike the hearsay portions of Jones' declaration submitted in opposition to the Department's motion for summary judgment, considering it only for "background" but "not for the truth of the matter asserted." We hold that the trial court properly granted the motion to strike, but it erred by considering the hearsay portions of Jones' declarations for any purpose. Because we are reversing any of the trial court's rulings that may have been based on inadmissible hearsay, we need not address the matter further.[32]

IV. Exhaustion of Administrative Remedies

The Department next asserts the trial court erred as a matter of law by holding that Jones' state law claims were not precluded by his stipulations. Relying on Laymon v. Dep't of Natural Resources,[33] it also contends these claims should have been dismissed because Jones failed to exhaust his administrative remedies. And because Jones derived a benefit from his agreement to a five year license suspension and the Pharmacy Board relied on the agreement when it signed the order, the Department argues that Jones should not be allowed to take a position inconsistent with the statements he made before the Pharmacy Board.

Jones argues that he was not required to exhaust his administrative remedies because doing so would not have mitigated his damages. He claims the defendants issued false investigation reports against him and his pharmacy, and the Department opposed his effort to effectively use the administrative process to challenge the summary suspension by opposing his motion for an expedited hearing. Because he

[32] We decline to address the Department's arguments concerning any allegedly contradictory statements within Jones' declarations because it did not raise this objection below.

[33] 99 Wn. App. 518, 994 P.2d 232 (2000).

had lost his pharmacy franchise, commercial lease, and business before the scheduled hearing, Jones contends that the administrative remedies available to him would not have prevented the harm he suffered. He asserts he entered into the Stipulated Order because he could not afford to proceed against the Board. And he argues that he neither admitted to the facts nor waived his right to sue the defendants by agreeing to the Stipulated Order.

It is well settled law that a party aggrieved by governmental action must exhaust available administrative remedies before filing suit unless he can establish that doing so would be futile.[34] When an aggrieved person fails to seek redress using available administrative procedures before filing suit, the trial court should dismiss the claim.[35] In Laymon, we affirmed the trial court's ruling dismissing the plaintiff's claims on summary judgment for failure to exhaust his administrative remedies. Laymon sued the Department of Natural Resources (DNR), the Department of Fish and Wildlife (DFW), and the State for administrative negligence. DNR issued a stop work order for logging on his land based on a report that a bald eagle nest site was located on the property.[36] Ten days after it issued the stop work order, DNR presented Laymon with a draft bald eagle management plan that placed significant restrictions on his planned development.[37] Despite his insistence that there could be no bald eagle on or adjacent to his property, Laymon's financial backers withdrew from the project, and he suffered

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[34] Laymon, 99 Wn. App. at 525 (citing CLEAN v. City of Spokane, 133 Wn.2d 455, 465, 947 P.2d 1169 (1997), cert. denied, 525 U.S. 812 (1998)).
[35] Id.
[36] Id. at 522.
[37] Id.

financial loss. Six months later, DFW determined that the bald eagle nest never existed.[38] Laymon did not pursue any avenue of administrative appeal.

Jones argues that Laymon is distinguishable because, even if Jones had pursued administrative remedies, he could not have saved his business. But Jones' arguments are not supported by the record. He waived his right to a prompt hearing when he failed to request one and file a written response to the summary license suspension within the 10 day time limit.[39] Rather than request a prompt adjudicative proceeding, Jones filed a Motion to Modify and Stay the Summary Suspension. Only after this motion was denied did he request an expedited hearing. By that time, he was no longer entitled to a hearing date outside the Pharmacy Board's regular schedule.[40]

Under our holding in Phillips v. King County, plaintiffs must exhaust their administrative remedies when an agency's rules set out a clearly defined process for resolving the aggrieved party's complaint.[41] This doctrine is based on the principle that the judiciary should give proper deference to agency expertise and allow the agency to develop the necessary factual background in order to correct its own errors.[42] Had Jones requested a prompt hearing, he could have immediately challenged the Statement of Charges and the Pharmacy Board could have evaluated the accuracy of the investigators' report. But Jones waived his right to a prompt hearing on September 10, 1999, and was not entitled to an expedited hearing before the next regularly

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[38] Id. at 523.
[39] WAC 26-11-340(3).
[40] WAC 246-11-340(2) provides: "Any respondent affected by a summary action may request [a] prompt adjudicative proceeding, may elect a regularly scheduled adjudicative proceeding instead of a prompt adjudicative proceeding, or may waive the opportunity for adjudicative proceeding in accord with WAC 246-11-270."
[41] 87 Wn. App. 468, 479, 943 P.2d 306 (1997), aff'd, 136 Wn.2d 946 (1998).
[42] Id. at 479-80.

scheduled date. The delay that took place between the date when the prompt hearing could have been held and the date the adjudicative hearing was ultimately scheduled was not caused by the Department or the individual defendants but by Jones' own strategic decisions. We hold that the trial court erred by finding that his state law claims could proceed despite his failure to exhaust his administrative remedies.[43]

CONCLUSION

We reverse and remand for entry of an order granting the Department's motion dismissing Jones' suit.

Appelwick, J.

WE CONCUR:

Ellington, J.

Baker, J.

[43] As part of his respondent's brief, Jones moved to strike the Department's reference to all out-of-state cases on the ground that reliance on these cases is not probative of any issue in this case. Jones does not cite any authority to support his motion. The Department's citations are relevant, and we deny the motion.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MICHAEL S. JONES, R.Ph., Respondent, v. STATE OF WASHINGTON; STATE OF WASHINGTON, DEPARTMENT OF HEALTH; STATE OF WASHINGTON, DEPARTMENT OF HEALTH, BOARD OF PHARMACY; PHYLLIS WENE; and STAN JEPPESEN, individually and as investigators for the Washington State Board of Pharmacy and DONALD WILLIAMS, individually and as executive director of the Board of Pharmacy, Appellants.	No. 57850-2-I ORDER GRANTING MOTION TO PUBLISH

Appellants, State of Washington, Board of Pharmacy, Phyllis Wene, Stan Jeppesen, and Donald Williams (the State), having filed a motion to publish the opinion in the above cause filed June 4, 2007; respondent, Michael S. Jones R.Ph., having filed a response to appellants' motion to publish; and the hearing panel having reconsidered its prior determination and finding that the opinion will be of precedential value; Now, therefore,

IT IS HEREBY ORDERED that the written opinion shall be published and printed in the Washington Appellate Reports.

DONE this 11th day of September, 2007.

FOR THE COURT:

Judge